Supreme Court U.S.
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No. 05-

IN THE

Supreme Court of the United States

MATEUS NEVES DA ROCHA and
KATHERYNE NEVES DA ROCHA,

Petitioners,

v.

ARKANSAS DEPARTMENT OF HEALTH
AND HUMAN SERVICES,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF ARKANSAS, DIVISION III

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether it violates the Fourteenth Amendment for a state to prevent parents from presenting their defense in no-reunification and termination of parental rights proceedings by invoking *res judicata*, collateral estoppel and default principles, particularly when the earlier finding of abuse was made under a lesser standard of proof than that applicable in a no-reunification termination case.

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CITATION TO OPINION BELOW

The decision of the Arkansas Court of Appeals is reported as *Neves da Rocha v. Arkansas Department of Human Services*, __ Ark. App. __, __ S.W.3d ___, 2005 WL 3307078. It was decided on December 7, 2005. (App. A) The unpublished order of the Circuit Court of Pulaski County is dated November 16, 2004. (App. B)

The Arkansas Department of Human Services has been renamed the Arkansas Department of Health and Human Services.

JURISDICTIONAL STATEMENT

This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257. The opinion of the Arkansas Court of Appeals was issued on December 7, 2005. A timely petition for review in the Arkansas Supreme Court was denied on January 26, 2006. (App. C) The mandate has been stayed to permit the Neves da Rochas to petition for certiorari.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fourteenth Amendment, United States Constitution:

> *. . . nor shall any state deprive any person of life, liberty, or property, without due process of law;*

Ark. Code Ann. § 9-27-325(h)

> (h)(1) The petitioner in all proceedings shall bear the burden of presenting the case at hearings.

(2) The following burdens of proof shall apply:

(A) Proof beyond a reasonable doubt in delinquency hearings;

(B) Proof by a preponderance of the evidence in dependency-neglect, family in need of services, and probation revocation hearings; and

(C) Proof by clear and convincing evidence for hearings to terminate parental rights and transfer hearings and in hearings to determine whether or not reunification services shall be provided.

Ark. Code Ann. § 9-27-341. Termination of parental rights (amendments to statute in 2005 are underlined, excisions to statute in 2005 are struck through)

(a)(1)(A) This section shall be a remedy available only to the Department of Health and Human Services or a court-appointed attorney ad litem. (B) It shall not be available for private litigants or other agencies.

(2) It shall be used only in cases in which the department is attempting to clear a juvenile for permanent placement.

(3) The intent of this section is to provide permanency in a juvenile's life in all instances in which the return of a juvenile to the family home is contrary to the juvenile's health, safety, or welfare and it appears from the evidence that a return to the family home cannot be accomplished

in a reasonable period of time as viewed from the juvenile's perspective.

(4)(A) A parent's resumption of contact or overtures toward participating in the case plan or following the orders of the court following the permanency planning hearing and preceding the termination of parental rights hearing is an insufficient reason to not terminate parental rights.

(B) The court shall rely upon the record of the parent's compliance in the entire dependency-neglect case and evidence presented at the termination hearing in making its decision whether it is in the juvenile's best interest to terminate parental rights.

(b)(1)(A) The circuit court may consider a petition to terminate parental rights if the court finds that there is an appropriate permanency placement plan for the juvenile.

(B) This section does not require that a permanency planning hearing be held as a prerequisite to the filing of a petition to terminate parental rights or as a prerequisite to the court's considering a petition to terminate parental rights.

(2)(A) The petitioner shall provide the parent, parents, or putative parent or parents actual or constructive notice of a petition to terminate parental rights.

(B) In addition to providing constructive notice of the hearing to terminate parental rights, the petitioner shall check with the putative father registry if the name or whereabouts of the putative father is unknown.

(3) An order forever terminating parental rights shall be based upon a finding by clear and convincing evidence:

(A) That it is in the best interest of the juvenile, including consideration of the following factors:

(i) The likelihood that the juvenile will be adopted if the termination petition is granted; and

(ii) The potential harm, specifically addressing the effect on the health and safety of the child, caused by ~~continuing contact with~~ returning the child to the custody of the parent, parents, or putative parent or parents; and

(B) Of one (1) or more of the following grounds:

(i)(a) That a juvenile has been adjudicated by the court to be dependent-neglected and has continued out of the custody of the parent for twelve (12) months and, despite a meaningful effort by the department to rehabilitate the parent and correct the conditions that caused removal, those conditions have not been remedied by the parent. (b) It is not necessary that the twelve-month period referenced in subdivision (b)(3)(B)(i)(a) of this section immediately precede the filing of the

petition for termination of parental rights or that it be for twelve (12) consecutive months;

(ii)(a) The juvenile has lived outside the home of the parent for a period of twelve (12) months, and the parent has willfully failed to provide significant material support in accordance with the parent's means or to maintain meaningful contact with the juvenile.

(b) To find willful failure to maintain meaningful contact, it must be shown that the parent was not prevented from visiting or having contact with the juvenile by the juvenile's custodian or any other person, taking into consideration the distance of the juvenile's placement from the parent's home.

(c) Material support consists of either financial contributions or food, shelter, clothing, or other necessities when the contribution has been requested by the juvenile's custodian or ordered by a court of competent jurisdiction.

(d) It is not necessary that the twelve-month period referenced in subdivision (b)(3)(B)(ii)(a) of this section immediately precede the filing of the petition for termination of parental rights or that it be for twelve (12) consecutive months;

(iii) The presumptive legal father is not the biological father of the juvenile and the welfare of the juvenile can best be served by terminating the parental rights of the presumptive legal father;

(iv) A parent has abandoned the juvenile;

(v) A parent has executed consent to termination of parental rights or adoption of the juvenile, subject to the court's approval;

(vi)(a) The court has found the juvenile dependent-neglected as a result of neglect or abuse that could endanger the life of the child, sexual abuse, or sexual exploitation, any of which was perpetrated by the juvenile's parent or parents.

(b) Such findings by the juvenile division of circuit court shall constitute grounds for immediate termination of the parental rights of one (1) or both of the parents;

(vii)(a) That other factors or issues arose subsequent to the filing of the original petition for dependency-neglect that demonstrate that return of the juvenile to the custody of the parent is contrary to the juvenile's health, safety, or welfare and that, despite the offer of appropriate family services, the parent has manifested the incapacity or indifference to remedy the subsequent issues or factors or rehabilitate the parent's circumstances that prevent return of the juvenile to the custody of the parent.

(b) The department shall make reasonable accommodations in accordance with the Americans with Disabilities Act, 42 U.S.C. § 12101 et seq., to parents with disabilities in order to allow them meaningful access to reunification and family preservation services.

(c) For purposes of this subdivision (b)(3)(B)(vii), the inability or incapacity to remedy or rehabilitate includes, but is not limited to, mental illness, emotional illness, or mental deficiencies;

(viii) The parent is sentenced in a criminal proceeding for a period of time that would constitute a substantial period of the juvenile's life ~~and the conditions in subdivision (b)(3)(B)(i) or (ii) of this section have also been established;~~ or

(ix)(a) The parent is found by a court of competent jurisdiction, including the juvenile division of circuit court, to:

(1) Have committed murder or voluntary manslaughter of any ~~child~~ juvenile or to have aided or abetted, attempted, conspired, or solicited to commit the murder or voluntary manslaughter;

(2) Have committed a felony battery or assault that results in serious bodily injury to any ~~child~~ juvenile or to have aided or abetted, attempted, conspired, or solicited to commit felony battery or assault that results in serious bodily injury to any juvenile;

(3)(A) Have subjected ~~the child~~ any juvenile to aggravated circumstances.

(B) "Aggravated circumstances" means:

(i) A juvenile has been abandoned, chronically abused, subjected to extreme or repeated cruelty, sexually abused, or a determination has been made by a judge that there is little likelihood that services to the family will result in successful reunification; or

(ii) A juvenile has been removed from the custody of the parent or guardian and placed in foster care or in the custody of another person more than three (3) times in the last fifteen (15) months;

(4) Have had his or her parental rights involuntarily terminated as to a sibling of the child; or

(5) Have abandoned an infant, as defined at § 9-27-303(2).

(b) This subchapter does not require reunification of a surviving child with a parent who has been found guilty of any of the offenses listed in subdivision (b)(3)(B)(ix)(a) of this section.

(c)(1) An order terminating the relationship between parent and juvenile divests the parent and the juvenile of all legal rights, powers, and obligations with respect to each other, including the right to withhold consent to adoption, except the right of the juvenile to inherit from the parent, which is terminated only by a final order of adoption.

(2)(A)(i) Termination of the relationship between a juvenile and one (1) parent shall not affect the relationship between the juvenile and the other parent if those rights are legally established.

(ii) If no legal rights have been established, a putative parent must prove that significant contacts existed with the juvenile in order for the putative parent's rights to attach.

(B)(i) When the petitioner has actual knowledge that an individual is claiming to be or is named as the putative parent of the juvenile and the paternity of the juvenile has not been judicially determined, the individual is entitled to notice of the petition to terminate parental rights.

(ii) The notice shall identify the rights sought to be terminated and those that may be terminated.

(iii) The notice shall further specify that the putative parent must prove that significant contacts existed with the juvenile for the putative parent's rights to attach.

(3) An order terminating parental rights under this section may authorize the department to consent to adoption of the juvenile.

(4) An order terminating parental rights under this section does not preclude adoptive parents from allowing contact between an adopted child and the birth sibling or other birth family members.

(d)(1) The court shall conduct and complete a termination of parental rights hearing within ninety (90) days from the date the petition for termination of parental rights is filed unless continued for good cause as articulated in the written order of the court.

(2) If the parent was represented by counsel, the court shall take judicial notice and incorporate by reference into the record all pleadings and testimony in the case incurred before the termination of parental rights hearing.

(e) A written order shall be filed by the court or by a party or party's counsel as designated by the court within thirty (30) days of the date of the termination hearing or before the next hearing, whichever is sooner.

(f) After ~~an order of~~ the termination of parental rights ~~is filed~~ hearing, the court shall review the case at least every three (3) months when the goal is adoption and, in other cases, every six (6) months, and a permanency planning hearing shall be held each year following the initial permanency hearing until permanency is achieved for that juvenile.

(g)(1)(A) A parent may withdraw consent to termination of parental rights within ten (10) calendar days after it was signed by filing an affidavit with the circuit clerk in the county designated by the consent as the county in which the termination of parental rights will be filed.

(B) If the ten-day period ends on a weekend or legal holiday, the person may file the affidavit the next working day.

(C) No fee shall be charged for the filing of the affidavit.

(2) The consent to terminate parental rights shall state that the person has the right of withdrawal of consent and shall provide the address of the circuit clerk of the county in which the termination of parental rights will be filed.

STATEMENT OF THE CASE

Petitioners Mateus and Katheryne Neves da Rocha are the parents of Victoria Neves da Rocha. The child was born on December 3, 2003 in Arkansas. Mateus Neves da Rocha is a citizen of Brazil and a legal resident of the United States. Katheryne Neves da Rocha is a citizen of the United States. The child Victoria has dual citizenship of the United States and Brazil.

Katheryne Neves da Rocha had a difficult pregnancy. The child was hospitalized for health problems when several weeks old. On January 10, 2004 the child was brought by her parents to the emergency room of Arkansas Childrens Hospital, who reported that the child had slipped from a parent's grasp but had been caught by the shoulder before hitting anything. The injury was consistent with the parents' narrative. The infant was discharged that evening. Some five days later she was again brought to the hospital. X-rays taken at that time revealed numerous broken bones allegedly in various stages of healing. The child had no bruises or other external signs of injury.

The Arkansas Department of Human Services (now the Department of Health and Human Services) took custody of the child and filed a dependency-neglect action. The Circuit Court of Pulaski County, Juvenile Division (Hon. Joyce Williams Warren) found the child to be dependent neglected by the statutory standard of preponderance of the evidence. Ark. Code Ann. § 9-27-325(h)(2)(B). The Neves da Rochas' then-lawyer did not file a notice of appeal. The Department then filed a petition to obtain a "no reunification" order. The statutory burden of proof in such a hearing is by clear and convincing evidence. Ark. Code Ann. § 9-27-325(h)(2)(C). The circuit court granted that petition and in the course of the hearing denied the Neves da Rochas the right to present exculpatory expert testimony of Dr. Charles Hyman, a pediatrician who opined in an offer of proof that the fractures were caused by natural causes and not by abuse. A notice of appeal was filed from that decision.

The Department then filed petition to terminate parental rights, also to be decided under the clear and convincing standard. Ark. Code Ann. § 9-27-325(h)(2)(C). Under different counsel, the Neves da Rochas again sought to present the testimony of Dr. Hyman. The circuit court denied this request and held that principles of *res judicata* and collateral estoppel precluded the Neves da Rochas from presenting their defense. The Neves da Rochas argued *inter alia* their federal and state constitutional rights of due process mandated that they have the opportunity to present their defense and that it was improper to use preclusion doctrines from a matter with a lesser standard of proof. Those arguments were denied.

On appeal, the Arkansas Court of Appeals, the state's intermediate appellate court, held that *Jefferson v. Arkansas Department of Human Services*, 356 Ark. 647, 158 S.W.3d 129 (2004), decided essentially contemporaneously with the dependency-neglect action in this case, precluded the Neves da Rochas from presenting their defense in the termination case. *Jefferson* held that failure to file a timely notice of appeal from a dependency-neglect finding "deprives this court of jurisdiction to consider the issues raised in that order." [The *Jefferson* court, however, then went on to consider whether the failure to provide counsel in that hearing caused fundamental unfairness; thus even under *Jefferson* there is review of an unappealed order.]

In this case the Court of Appeals did not deal with the constitutional issue, although it was presented in the brief. The Neves da Rochas then sought review in the Arkansas Supreme Court and pointed out that the Court of Appeals had not addressed the constitutional issues. On January 26, 2006, the Supreme Court denied the petition without comment but granted a stay of mandate in order to petition this Court for certiorari.

After the conclusion of the termination case, both of the Neves da Rochas were charged by felony information with Battery in the First Degree in the Circuit Court of Pulaski County, Arkansas. They have entered pleas of not guilty. The trial in the matter currently is scheduled to begin May 31, 2006.

REASONS FOR GRANTING THE PETITION

THE FOURTEENTH AMENDMENT IS VIOLATED WHEN A STATE INVOKES RES JUDICATA, COLLATERAL ESTOPPEL AND PROCEDURAL DEFAULT GROUNDS TO PREVENT PARENTS FROM PRESENTING THEIR DEFENSE IN NO-REUNIFICATION AND TERMINATION OF PARENTAL RIGHTS PROCEEDINGS, PARTICULARLY WHEN THE EARLIER FINDING OF ABUSE WAS MADE UNDER A LESSER STANDARD OF PROOF THAN THAT APPLICABLE IN A NO-REUNIFICATION OR TERMINATION CASE.

This case presents an opportunity for the Court to develop the scope of Fourteenth Amendment due process protections in a case involving no-reunification of termination of parental rights, and whether preclusion doctrines such as res judicata and collateral estoppel can be used to prevent parents from presenting a defense, particularly where, as in this case, the prior judgment was obtained under a lesser standard of proof—preponderance of the evidence—than the clear and convincing requirement of no-reunification and termination proceedings under Arkansas law. Ark. Code Ann. § 9-27-325(h)

This case falls within the language of Rule 10(c) of the Rules of the United States Supreme Court. The Arkansas Court of Appeals decided—and the Arkansas Supreme Court denied review of— this important federal question in a way that conflicts with decisions of this Court. Those decisions include *M.L.B. v. S.L.J.*, 519 U.S. 102, 117 S. Ct. 555 (1996); *Boddie v. Connecticut*, 401 U.S. 371, 91 S. Ct. 780 (1971); *Maggio v. Zeitz*, 333 U.S. 56, 68 S. Ct. 401 (1948); *United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 104

S. Ct. 1099 (1984). As described in the Statement of the Case, the issues were fairly presented to the Arkansas courts but were either overruled or not ruled upon.

Arkansas procedure involving termination of parental rights consists of three steps: (i) A finding of dependency-neglect, adjudicated by the preponderance standard; (ii) a no-reunification decision, adjudicated by a clear and convincing standard; and (iii) the termination case itself, also adjudicated by a clear and convincing standard. In this case, the Arkansas trial court relied on a finding made under the preponderance standard to prevent the Neves da Rochas from presenting a defense to either the no-reunification or parental termination petitions.

This Court has held that a fair hearing with a meaningful opportunity to be heard is a requirement of due process of law under the Fifth and Fourteenth Amendments. *Boddie v. Connecticut*, 401 U.S. 371, 91 S. Ct. 780 (1971). *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S. Ct. 652 (1950). *Franklin v. State*, 267 Ark. 311, 590 S.W.2d 28 (1979). *State of Washington. v. Thompson*, 339 Ark. 417, 6 S.W.3d 82 (1999).

This is especially true in the context of parental termination proceedings. *M.L.B. v. S.L.J.*, 519 U.S. 102, 117 S. Ct. 555 (1996). As this Court said in *M.L.B*:

> Choices about marriage, family life, and the upbringing of children are among associational rights this Court has ranked as "of basic importance in our society," *Boddie*, 401 U.S., at 376, 91 S. Ct., at 785, rights sheltered by the Fourteenth Amendment against the State's

> unwarranted usurpation, disregard, or disrespect. See, for example, *Turner v. Safley*, 482 U.S. 78, 107 S. Ct. 2254, 96 L. Ed. 2d 64 (1987), *Zablocki v. Redhail*, 434 U.S. 374, 98 S. Ct. 673, 54 L. Ed. 2d 618 (1978), and *Loving v. Virginia*, 388 U.S. 1, 87 S. Ct. 1817, 18 L. Ed. 2d 1010 (1967) (marriage); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 62 S. Ct. 1110, 86 L. Ed. 1655 (1942) (procreation); *Pierce v. Society of Sisters*, 268 U.S. 510, 45 S. Ct. 571, 69 L. Ed. 1070 (1925), and *Meyer v. Nebraska*, 262 U.S. 390, 43 S. Ct. 625, 67 L. Ed. 1042 (1923) (raising children). M. L. B.'s case, involving the State's authority to sever permanently a parent-child bond, demands the close consideration the Court has long required when a family association so undeniably important is at stake.

519 U.S. at 116-117, 117 S. Ct. at 564

This Court has held that the use of an adjudication under a lower standard of proof cannot be used to preclude adjudication under a different, higher standard. *Maggio v. Zeitz*, 333 U.S. 56, 78-79, 68 S. Ct. 401, 412-413 (1948); *United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 362, 104 S. Ct. 1099, 1104 (1984). This principle was wholly ignored by the Arkansas courts.

Furthermore, the Arkansas statute, Ark. Code Ann. § 9-27-341, does not require termination of parental rights even if dependency neglect or even parental causation of the injuries is found. Rather, the controlling criterion is the "best interest" of the child with consideration of those and other factors. There is no statutory language authorizing application of preclusion doctrines on the ultimate issue of best interest.

This Court should grant certiorari to discuss and determine the constitutional rights of parents and limitations upon the state in no-reunification and termination cases and when procedural default and preclusion principles can be used to prevent presentation of a defense.

CONCLUSION

The Neves da Rochas request that this Court grant certiorari, and upon plenary determination reverse and vacate the decision of the Arkansas courts.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE COURT OF APPEALS OF ARKANSAS, DIVISION III DATED DECEMBER 7, 2005

COURT OF APPEALS OF ARKANSAS
Division III

No. CA 04-915

KATHERYN NEVES DA ROCHA
and MATEUS NEVES DA ROCHA,

Appellants

v.

ARKANSAS DEPARTMENT OF HUMAN SERVICES,

Appellee.

December 7, 2005

Appeal from the Pulaski County Circuit Court, Tenth Division [JN 04-224]; Joyce W. Warren, *Circuit Judge.*

DAVID M. GLOVER, *Judge.*

In an order entered November 16, 2004, the parental rights of Katheryn and Mateus Neves da Rocha, appellants herein, were terminated as to their daughter, V.N. Appellants now appeal that order, arguing that the trial court misapplied the doctrines of res judicata and collateral estoppel in this case, thereby improperly dispensing with DHS's burden of proof and depriving appellants of a proper opportunity to be

heard. Under this broad point of appeal, appellants have delineated eight subpoint headings:

A. Definitions of res judicata and a particular type thereof: collateral estoppel.

B. The Neves da Rochas did not receive the full and fair hearing in the earlier proceedings required for application of the doctrines.

C. The preclusion doctrines are inapplicable because of differences in the standard of proof.

D. The preclusion doctrine is particularly inapplicable to the termination hearing because the case was on appeal at the time.

E. The circuit court abused its discretion by permitting the use of offensive collateral estoppel.

F. The apparent application of Ark.Code Ann. § 9-27-341 as a basis to apply preclusion doctrines is also flawed.

G. In addition to the structural problems caused by the circuit court's rulings, the Neves da Rochas can demonstrate actual prejudice from the denial of their right to call an expert witness.

H. The denial of continuances also prejudiced the Neves da Rochas.

Appendix A

In *Bearden v. Department of Human Services*, 344 Ark. 317, 328, 42 S.W.3d 397, 403-04 (2001) (citations omitted), our supreme court, citing *Ullom v. Department of Human Services*, 340 Ark. 615, 12 S.W.3d 208 (2000), set forth the well-settled standard of review in cases where parental rights have been terminated:

> We have held that when the issue is one involving the termination of parental rights, there is a heavy burden placed upon the party seeking to terminate the relationship. Termination of parental rights is an extreme remedy and in derogation of the natural rights of the parents. Parental rights, however, will not be enforced to the detriment or destruction of the health and well-being of the child. The facts warranting termination of parental rights must be proven by clear and convincing evidence. In reviewing the trial court's evaluation of the evidence, we will not reverse unless the court's finding of clear and convincing evidence is clearly erroneous. Clear and convincing evidence is that degree of proof which will produce in the factfinder a firm conviction regarding the allegation sought to be established. In resolving the clearly erroneous question, we must give due regard to the opportunity of the chancery court to judge the credibility of witnesses. Additionally, we have noted that in matters involving the welfare of young children, we will give great weight to the trial judge's personal observations.

In the present case, a petition for emergency custody was filed by DHS on January 25, 2004. In the affidavit in support of that petition, Raeshunna Robinson, a DHS employee, stated that V.N., who was born on December 2, 2003, was taken to the emergency room at Arkansas Children's Hospital

for a second time on January 15, 2004, where it was determined that she had multiple bone fractures all over her body that were of varying ages. She had previously been taken to the emergency room on January 10, 2004, at which time she was diagnosed with a broken clavicle and humerus. Robinson stated in her affidavit that V.N. was taken into DHS custody on January 22, 2004, because she had too many unexplained broken bones in her body and that the agency was concerned for her safety and welfare. An order of emergency custody was filed of record on January 26, 2004, placing custody of V.N. with DHS; appointing Stasia Burk as attorney ad litem for her; and setting the probable-cause hearing for January 30, 2004.

The probable-cause hearing was held on January 30, 2004, at which time the trial judge found that it was contrary to V.N.'s health and welfare to be returned to her parents due to the multiple number of fractures she had sustained without any explanation. At that hearing, both parents testified that they did not know what caused all the fractures, and they denied harming their child. Katheryn Neves da Rocha testified that V.N.'s bone densitometry test and parathyroid and vitamin D levels were all normal; however, the results of a collagen test to determine whether she had osteogenesis imperfecta (brittle-bone disease) were not back at the time of this hearing. The trial judge scheduled the adjudication hearing for March 18 and 24, 2004, setting the date out as far as possible in order to hopefully have the results of the collagen test at that time, but stating that the matter absolutely had to be heard within sixty days, and that under no circumstances could the trial court continue the hearing any later than sixty days. *See* Ark.Code Ann. § 9-27-

327(a)(1)(B) (Supp.2005) (adjudication hearing to be held within thirty days after the probable-cause hearing; adjudication hearing can be continued for thirty days upon motion of court and parties for good cause shown, but the adjudication hearing shall not be completed more than sixty days after the probable-cause hearing).

The adjudication hearing was held on March 24, 2004. At the beginning of the hearing, appellants' attorney objected to holding the hearing that day, arguing that the statute mandating that the adjudication hearing be held within sixty days of the probable-cause hearing was unconstitutional and violated his clients' rights to procedural and substantive due process because the one definitive test regarding brittle-bone disease had not yet been completed.

In response, DHS cited *Hathcock v. Arkansas Department of Human Services*, 347 Ark. 819, 69 S.W.3d 6 (2002), in which our supreme court held that the purpose of the time limit on continuances for adjudication hearings was clear,[1] and that the limited continuance provision of the juvenile code controlled rather than Rule 40(b) of the Arkansas Rules of Civil Procedure because it served the specific purpose of expediting hearings involving children in out-of-home placements. Based upon this case, the trial court denied appellants' request to continue the hearing until the results of the brittle-bone test could be learned.

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1. The statutory provision in place at the time *Hathcock* was decided was fifty days, which has now been increased to sixty days. *See* Ark.Code Ann. § 9-27-315(d)(2) (Supp.2005).

Appendix A

At the adjudication hearing, Katheryn Neves da Rocha testified again that she did not know what caused V.N.'s injuries. She stated that except for her husband dropping V.N. one time, they did not know who could have done this to their child. Mateus Neves da Rocha testified that one of the fractures could be explained by the incident when he accidentally dropped his daughter, but he did not have an explanation for any of the other fractures. Both parents expressed that they thought V.N. would be safe with them. In its amended adjudication order, the trial court found that V.N. was dependent/neglected; that the injuries suffered by V.N. were not accidental; and that one or both of the parents were the likely ones who caused the injuries. The trial court noted that this was a sad case, but it had to rule on the testimony that had been presented. The trial court pointed out that both parents denied harming the child, but X-rays indicated fractures of varying ages, ranging from two to four weeks old. The trial court found that there were several types of fractures, some consistent with fractures that a child-abuse victim might have, including bucket-handle fractures and oblique fractures, and that the radiologist's findings were suspicious of trauma. The trial court also found that the evidence and observation of medical personnel did not reveal symptoms of brittle-bone disease, while noting that the results of the one test that would determine brittle-bone had not been returned. The trial court further found that V.N. was not safe in her parents' home. *The findings in this adjudication order were not appealed.*

At the disposition hearing on April 7, 2004, the trial court found that adoption should be the goal because it was in V.N.'s best interests due to her injuries and the fact that one

or both of her parents likely caused the injuries. On May 13, 2004, the trial court entered a no-reunification-efforts order, finding that it was in V.N.'s best interests that no reunification services be provided. The trial court found that V.N. had been subjected to extreme and repeated cruelty; that the injuries were not accidental; and that one or both parents likely caused the injuries. The trial court also noted that the last bone test, the one for osteogenesis imperfecta, had come back with no abnormal findings.

At the no-reunification hearing, DHS's attorney moved to incorporate the record of the case into the hearing, and there were no objections. Also at that hearing, the trial court denied appellants' motion to allow Dr. Charles Hyman to testify regarding alternative theories of the source of V.N.'s injuries other than from her parents, finding that all of the issues that Dr. Hyman would testify about had already been litigated, and that it was res judicata and not relevant to that stage of the proceeding. Appellants filed a notice of appeal after entry of the no-reunification order.[2]

The trial court entered an order on November 16, 2004, from the October 29, 2004 termination hearing finding that it was in V.N.'s best interests to terminate appellants' parental rights. In that order, the trial court noted that it incorporated into the record all of the pleadings and testimony in the case incurred before the termination of parental rights hearing; that it denied appellants' request to allow Dr. Hyman to testify; and that it granted the termination of appellants'

2. This court granted appellants' motion to hold briefing in abeyance until the record from the termination hearing could be lodged.

parental rights. Appellants also filed a notice of appeal from this order.

Each of the first six subpoints of appellants' argument pertain to the trial court's refusal to allow appellants to present testimony from Dr. Charles Hyman at the no-reunification hearing that refuted a finding of child abuse on the part of appellants. The trial court refused to allow Dr. Hyman to testify, stating, "All the issues that Mr. Smith believes Dr. Hyman can testify about have already been litigated. It is res judicata. It is not relevant to this stage of the proceeding."

The process through which a parent or parents travel when a child is removed from their home consists of a series of hearings—probable cause, adjudication, review, no reunification, disposition, and termination. All of these hearings build on one another, and the findings of previous hearings are elements of subsequent hearings. "[T]he proceedings and orders pertaining to the termination of parental rights [are] in fact a continuation of the original dependency-neglect case." *Wade v. Arkansas Dep't of Human Servs.*, 337 Ark. 353, 361, 990 S.W.2d 509, 514 (1999). Furthermore, a second dependency-neglect adjudication is not required at the final hearing—DHS must only prove that the child has been previously adjudicated dependent/neglected. *Bearden v. Arkansas Dep't of Human Servs.*, 344 Ark. 317, 42 S.W.3d 397 (2001).

In this case, appellants had the opportunity at the adjudication hearing to present competing evidence to DHS's assertion that they had abused their child—yet they presented

none. This was the place for Dr. Hyman's testimony— prior to the adjudication of V.N. as dependent/neglected and the trial court's findings that the injuries were not accidental, that appellants were the ones who likely caused the injuries, and that V.N. was in fact a victim of child abuse.

It is not necessary to address appellants' arguments concerning res judicata because they did not appeal the adjudication order, which is an appealable order. Ark. R.App. P.-Civ. 2(c)(3)(A). Because appellants failed to appeal this order, in accordance with our supreme court's decision in *Jefferson v. Arkansas Department of Human Services*, 356 Ark. 647, 158 S.W.3d 129 (2004), this court cannot now consider arguments relating to errors made during the adjudication hearing. Appellants are trying to relitigate the merits of the adjudication hearing with the introduction of Dr. Hyman's testimony at both the no-reunification hearing and the termination hearing, and *Jefferson* makes it clear that that is improper. *See also Lewis v. Arkansas Dep't of Human Servs.*, __ Ark. __, __ S.W.3d __ (Nov. 17, 2005).

In their next subpoint, appellants argue that they can demonstrate actual prejudice from the denial of their right to call Dr. Hyman as an expert witness. However, as discussed above, Dr. Hyman's intended testimony was offered to refute the earlier adjudication-hearing finding that V.N. had been abused, and that is not allowed under our supreme court's holding in *Jefferson*, *supra.*

Appellants' last subpoint, that the denial of continuances prejudiced them, is broken down into the denial of the original continuance in the dependency-neglect hearing and

the denial of the continuance at the termination hearing. With regard to the denial of the continuance in the dependency-neglect hearing, it is clear that we are bound by the reasoning set forth above from *Hathcock v. Arkansas Department of Human Services*, *supra*, which is applicable in this case and which supports the denial of appellants' motion for continuance at the dependency-neglect hearing.

We also find no error with regard to the denial of the continuance at the termination hearing to afford Dr. Hyman an opportunity to examine V.N. As the trial court stated at the hearing, it could see no other purpose for Dr. Hyman's testimony than to refute the original cause of the injuries and the finding of dependency neglect from the adjudication hearing, which, as discussed above, is not permitted by our supreme court's holding in *Jefferson*, *supra*.

Affirmed.

NEAL and VAUGHT, JJ., agree.

APPENDIX B — ORDER OF THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS, 10TH JUVENILE DIVISION DATED NOVEMBER 16, 2004

IN THE CIRCUIT COURT OF
PULASKI COUNTY, ARKANSAS
10th JUVENILE DIVISION

NO. JN 2004-224

ARKANSAS DEPARTMENT OF HUMAN SERVICES

PLAINTIFF

VS.

KATIE NEVES DA ROCHA, MOTHER
MATEUS NEVES DA ROCHA, FATHER OF:

VICTORIA NEVES DA ROCHA, FEMALE, DOB: 12/2/03
JUVENILE

DEFENDANTS

Bench Trial

ORDER TERMINATING PARENTAL RIGHTS AND GRANTING TO THE ARKANSAS DEPARTMENT OF HUMAN SERVICES THE POWER TO CONSENT TO ADOPTION

On this 29th of October 2004, the above-entitled cause of action is presented to the Court for action upon a Petition for Termination of Parental Rights of both parents, filed on

July 13, 2004, by the Arkansas Department of Human Services, custodian of the above-named juvenile(s), Honorable Joyce Williams Warren presiding. Present before the Court include: Charles Finkenbinder, Attorney for DHS; Felicia Carter, DHS caseworker; Mateus and Katie Neves de Rocha, parents; Amy Blackwood and Jeff Rosensweig, parents' attorneys; Stasia Burk, attorney *ad litem*; Dr. Charles Hyman, witness; Erma Lawrence, grandmother; Martha Lawrence, cousin; Judi Hurt, friend; Jennifer Rogers, friend; Suzanne Dudgeon, friend; Don Dudgeon, pastor; Liz and Ed Reeves, friends; Tom Hamblen, friend; Penny Henderson, friend; Drucilla and Ronald Koser, maternal grandmother and step grandfather.

From the testimony, exhibits, statements of the parties and counsel, the record herein, and other things and matters presented, the Court noting the best interests, welfare, case plan, health and safety and appropriate statutory placement alternatives, does hereby **FIND, ORDER, and ADJUDGE**:

1. This Court possesses jurisdiction, of the parties and this cause pursuant to Ark. Code Ann. §§ 9-27-306 and 9-27-307. Due notice of this proceeding has been provided to all the parties. The parents were served with notice by warning order which was published July 18, 2004 and July 25, 2004.

2. Pursuant to Ark. Code Ann. § 9-27-341(b)(3)(B)(ix)(d)(2), the Court grants the motion of DHS and the Attorney *ad litem*, and hereby takes judicial notice and incorporates into the record all the pleadings and testimony in this case incurred before the termination of parental rights

hearing, as the parents have been represented by an attorney since the probable cause hearing.

3. The parents' repeated, renewed motions for continuance are again denied, as is their alternative motion to begin the hearing, recess until later, and hold the record open without a finding, until after a follow-up examination is done on the juvenile. The Court denies the parents' repeated requests to allow Dr. Charles Hyman, an expert witness, to present evidence on the issue of the cause of the juvenile's injuries. The Court has already determined that the juvenile was dependent/neglected as a result of non-accidental injuries (except one), which were caused by one or both of the parents. Relitigation of the cause of the juvenile's injuries and the dependency/neglect finding is barred by the doctrine of collateral estoppel, specifically, issue preclusion.

4. The Court grants the parents' request to proffer the testimony of Dr. Charles Hyman. Parents' attorney, Mr, Rosensweig, will file a brief with the Court by Wednesday, November 3, 2004 on the issue of whether the right of cross examination applies during the offer of excluded evidence. DHS' attorney, Mr. Finkenbinder, and the Attorney *ad litem*, Stasia Burk, will file their response briefs with the Court by November 17, 2004.

5. The Court denies the parents' motion to dismiss this petition, and hereby finds that the Petition to Terminate Parental Rights of both parents is granted. This finding is based on clear and convincing evidence that it is in Victoria's best interests, including consideration of following factors: the likelihood that the juvenile will be adopted if the petition

to terminate parental rights is granted; and the potential harm, specifically addressing the effect on the health and safety of the juvenile, caused by continuing contact with the parents; and clear and convincing evidence of the grounds alleged in the petition.

Victoria was removed from the home on January 22, 2004 and was placed in the custody of the Department of Human Services (hereafter referred to as DHS) because she, then seven weeks old, had multiple bone fractures of varying ages with no history of trauma to explain all of the fractures. She was found to be dependent/neglected on March 24, 2004 because the history given by the parents and the lack of any history given by the parents for her injuries other than to the clavicle and the humerus (which was noted in the January 15, 2003 emergency room visit) was not consistent with the juvenile's injuries. The Court found that the injuries were not accidental injuries, and that one or both of the parents caused those injuries to Victoria. The Court further found that, according to the January 15, 2003 x-rays, there were several different types of fractures, some of which were consistent with what a child abuse victim might have. The radiologist's findings were that the juvenile's injuries were suspicious for trauma. Several tests had been performed for bone diseases, and those tests have shown normal findings. The evidence and observation by medical personnel did not reveal symptoms of osteogenisis imperfecta, so there were no clinical findings of osteogenesis imperfecta at that point. As those tests could not rule out the possibility of osteogenesis imperfecta, the one test, a cone tissue test which could definitely rule in or out osteogenesis imperfecta, was performed, but the results of that test had not yet been

returned at the time of the adjudication hearing. A skeletal survey preformed on Victoria the same month of the adjudication hearing had not revealed any new fractures, and the fractures that she had sustained were at various stages of healing.

The Court ordered that Victoria remain in the custody of the Department of Human Services (hereafter referred to as DHS), as she was not safe at that time in the home of her parents. The parents were ordered to have supervised visitation with Victoria at the DHS office. The Court scheduled the disposition hearing for a separate date in the hopes that the test for osteogenesis imperfecta could be back by that time. The Court made a determination that DHS had trade reasonable efforts, and specified the particular services that the agency had provided to the family.

At the disposition hearing on April 7, 2004, the DHS caseworker testified that the results of Victoria's bone tissue tests had returned and the tissue was normal. The Court noted that a home study had been conducted on Esther and Bryan Gamble, Victoria's great aunt and uncle, who wanted to be considered for placement of Victoria. However, the home study was not complete, as the criminal background and central registry check results had not returned to DHS, there were some environmental concerns, and none of the parties (including the parents) were recommending that Victoria be placed in the Gambles' custody. The Court determined that it was in Victoria's best interests that adoption be the goal of the case, that she remain in the custody of DHS, and that the parents should continue to visit her as previously ordered by the Court. The Court determined that reasonable efforts had

been made by DHS to provide services to the family while Victoria was in DHS' custody. At that hearing, the parents were served with copies of the Notice of Recommendation by DHS and Attorney *ad litem* that Reunification services should not be provided. The Court scheduled a May 13, 2004 date for a No Reunification Efforts hearing and a possible permanency planning hearing.

On May 13, 2004, the Court ordered that no reunification services be provided by DHS to both parents, as the DHS and Attorney *ad litem* had proven, by clear and convincing evidence, that both parents had subjected the juvenile to aggravated circumstances. At that time the Court found these 2 (two) specific aggravated circumstances: (1) Victoria has been subjected to extreme and repeated cruelty, and (2) there is little likelihood that services to the family will result in successful reunification. The Court also found that one or both parents had committed a felony assault that resulted in serious bodily injury to a child. The Court's findings were that:

(a) Victoria had been subjected to extreme and repeated cruelty. In the adjudication order, the Court made a determination of dependency/neglect based on the history given by the parents and the lack of history given by the parents for the injuries, other than the fractures to the clavicle and humerus, which were not consistent with Victoria's injuries. The Court found those injuries were not accidental, and that one or both parents were likely the ones who caused those injuries. The injuries were of varying ages, some less than two (2) weeks old, others about two (2) to four (4) weeks, and others of intermediate ages. Victoria had several types

of fractures, some of which were consistent with what a child abuse victim might have. The Court named the specific injuries that were suspicious for child abuse being the bucket-handle fractures, which were on the upper legs; the corner fractures on the lower legs; and the oblique fractures on the right upper arms. The Court noted, as the radiologist found, that Victoria's injuries were suspicious for child trauma.

The Court also noted that all the tests that had been administered for bone diseases came back normal. The last test for osteogenesis imperfecta, the bone tissue test, also came back with no abnormal findings. Victoria had no fractures since she had been in foster care. It was of utmost cruelty to break a child's bones by non-accidental means and to cause breaks at different times and over a period of time. Such actions were not only extreme cruelty but repeated cruelty. Victoria was a baby, a helpless child, who was at the mercy of and in the care of her parents, who were the very ones charged by law and with a moral responsibility to see that she is at all times protected from neglect and abuse that could cause her substantial harm or could put her at serious risk of substantial harm.

(b) There was little likelihood that services to the family would result in successful reunification. The parents had not given any history to support the cause of the fractures other than the ones that were determined to be accidental. The Court noted that the parents had not accepted responsibility for those injuries, and, if they were not admitting to anything, they certainly could not accept responsibility for anything. Although the parents said they had no other explanations, the ones previously given by the parents were not sufficient

in light of the evidence and findings made by this Court, which were also supported by medical findings.

The Court agreed with the Attorney *ad litem* that, if the Court has no idea of the circumstances of the parents which caused Victoria's removal from the home, it is futile, especially in a case as egregious as this, to order reunification services that would take a shotgun approach and perhaps still miss the mark of remedying the cause of removal in order that Victoria could safely and permanently return to her parents' home.

(c) One or both parents had committed a felony assault that resulted in serious bodily injury to a child. A.C.A. § 5-13-204(a)(1), which defines aggravated assault, a D felony, provides: " A person commits aggravated assault if, under circumstances manifesting extreme indifference to the value of human life, he or she purposely engages in conduct that creates a substantial danger of death or serious physical injury to a family or household member."

A.C.A. § 5-26-306(a), which defines aggravated assault on a family or household member, reads: "A person commits assault on a family or household member if, under circumstances manifesting extreme indifference to the value of human life, he purposely engages in conduct that creates a substantial danger of death or serious physical injury to a family or household member."

Serious physical injury is defined, in A.C.A. § 5-1-102 (19), as this: "Serious physical injury is any injury that creates a substantial risk of death or that causes protracted

disfigurement, protracted impairment of health or loss, or protracted impairment of the function of any bodily member or organ."

The Court noted that the record contained testimony that supported a finding by the Court that Victoria sustained physical injury that was serious.

6. The findings that the Court made at the No Reunification Efforts hearing still hold true today. The parents continue to maintain their position that they did nothing wrong and that they did not cause these injuries to Victoria. Continuing contact with Victoria and her parents could harm Victoria's health and safety. She has already been physically harmed by one or both of her parents while in their custody and control. Allowing her to continue to have contact with her parents, who have denied responsibility for physically abusing her, would place her directly in harm's way and this would certainly be against her best interests. This Court can think of few things more frightening and dangerous than allowing a child who is almost one year old to have continuing contact with parents (or any person for that matter) who have caused serious injury to that child when the child was only a couple of months old. If a child cannot be safe in the home of his or her parents, then that child must be placed elsewhere, out of the clutches of such unfit persons. Victoria was not and still is not safe with her parents, and her parents are not fit and proper parents for this or any child. Victoria needs a safe, permanent, loving home with responsible, appropriate parents who can provide the proper care, custody and control and meet all of her needs. It is certainly in her best interests to have such an environment in which to live

and flourish. Victoria is almost eleven (11) months old and has been out of her parents' custody for nine (9) months of her short life, and the parents are the cause of her being removed and placed in foster care.

7. DHS has an appropriate plan for Victoria's permanent placement, and that plan is adoption. Adoption is in Victoria's best interests. Testimony presented indicates that there is a very good likelihood that Victoria can be adopted if the petition to terminate parental rights is granted. Brenda Keith, the DHS adoption specialist on this case, testified that she would have no problems with a healthy child of Victoria's age being adopted. She stated that DHS had found 21 (twenty-one) potential adoptive homes for Victoria, and that she anticipated no problems with placing Victoria in such a home if the Court did terminate Victoria's parents' rights.

8. DHS has made reasonable efforts to provide appropriate services to finalize the permanency plan of adoption.

9. The parental bonds between Victoria and her parents are hereby forever severed.

10. Victoria shall continue in the custody of DHS. DHS shall have the authority to consent to her adoption without further notice to or consent of the parents.

11. The style of this case shall be changed to In Re: Victoria Neves da Rocha, and the clerk of the Court is directed to accept filings under this style.

Appendix B

12. Jurisdiction and venue of this cause are retained, with a review hearing to be scheduled as required by law.

IT IS SO ORDERED.

s/ Joyce Williams Warren
JOYCE WILLIAMS WARREN, CIRCUIT JUDGE
DATE: 11/16/04

APPENDIX C — ORDER OF THE ARKANSAS SUPREME COURT DENYING PETITION FOR REVIEW DATED JANUARY 26, 2006

IN THE ARKANSAS SUPREME COURT

KATHERYN NEVES DA ROCHA
and MATEUS NEVES DA ROCHA,

Appellants

v.

ARKANSAS DEPARTMENT OF HUMAN SERVICES,

Appellee.

Petition for Review is denied.

Appellants' Motion for Stay of Mandate granted.

No. 05-1370

FILED
MAY 30 2006
OFFICE OF THE CLERK

In The Supreme Court of the United States

KATHERYNE NEVES DA ROCHA, and
MATEUS NEVES DA ROCHA,

Petitioners,

v.

ARKANSAS DEPARTMENT OF
HEALTH AND HUMAN SERVICES

**On Petition For A Writ Of Certiorari
To The Court Of Appeals
Of Arkansas, Division III**

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the state trial court correctly excluded evidence as to cause of injury at the "no reunification" hearing and the termination of parental rights hearing where the issue had previously been litigated and not appealed.

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OPINION BELOW

The opinion of the Arkansas Court of Appeals is reported as *Neves da Rocha v. Arkansas Department of Human Services*, ___ Ark. App. ___, ___ S.W.3d ___, 2005 WL 3307078. It was decided on December 7, 2005. The order of the Circuit Court of Pulaski County, Arkansas, was entered November 16, 2004.

JURISDICTION

The judgment of the court of appeals was entered on December 7, 2005. A petition for review in the Arkansas Supreme Court was denied on January 25, 2005. The Arkansas Supreme Court stayed the mandate pending the outcome of this petition.

STATEMENT

The petitioners, Mateus and Katheryne Neves Da Rocha, took their daughter Victoria to Arkansas Children's Hospital on January 15, 2004. At that time, Victoria was found to have multiple fractures including fractures to her right, upper, and lower arms, both upper and lower legs, and multiple fractures of her ribs. The x-rays revealed that some of the fractures were less than two weeks old, and others were about two to four weeks old. Several of the fractures were described as bucket handle fractures, a type of fracture commonly seen in abused children. Victoria was placed in emergency custody on January 22, 2004.

An adjudication hearing was held on March 24, 2004, by the Pulaski County Circuit Court. Several tests had been performed on Victoria and for bone disease without any abnormalities found. Victoria had no symptoms of osteogenesis imperfecta, also known as brittle bone disease. After being placed in a foster home Victoria did not have any new bone fractures. The trial court found that the Department of Human Services had established by a preponderance of the evidence that Victoria was abused by one or both of her parents. The petitioners did not request a new trial, and no appeal was filed.

Next, on May 13, 2004, a "no reunification services" hearing was conducted. At the beginning of the hearing, the attorney for the Department of Human Services made a motion requesting that the complete record of the case be incorporated into the hearing. There was no objection to this motion and it was granted. The trial court Victoria had been subjected to aggravated circumstances, and therefore reunification services were not to be provided.

The final hearing, a termination of parental rights hearing, was concluded on October 29, 2004. The record from the previous hearings was again incorporated into the record of the termination hearing. The petitioners sought to present testimony to disprove that they caused Victoria's injuries. The trial court found that the testimony would not be relevant, and the petitioner's witness was not allowed to testify. Based on the evidence, the trial court found that Victoria had been subjected to extreme and repeated cruelty, that there was little likelihood that services to the family would result in successful reunification, and that one or both parents had committed a felony

assault that resulted in serious bodily injury to a child, the trial court granted the petition to terminate parental rights.

REASONS FOR DENYING THE PETITION

This Court should deny the petition for a writ of certiorari. The Arkansas Court of Appeals correctly held that the circuit court did not violate the petitioners' constitutional right to due process. The state court decision does not substantially conflict with any decision of this Court or any other Court of Appeals. Further review is unwarranted.

It is well settled that this Court will not review a final judgment of a state court unless 'the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system. *Board of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 550 (1987). In this case, the petition should be denied because the issues presented by the petitioners were not fully addressed in the state court decision. *Heath v. Alabama,* 474 U.S. 82, 87 (1985); *Illinois v. Gates,* 462 U.S. 213, 217-219 (1983). Likewise, the petitioners have not met their burden of showing that the issues were properly presented to the Arkansas Court of Appeals. When the highest state court is silent on a federal question, this Court should assume that the issue was not properly presented, *Board of Directors of Rotary Int'l v. Rotary Club of Duarte,* 481 U.S. 537, 550 (1987). The petitioner bears the burden of defeating this assumption, *ibid.,* by demonstrating that the state court had "a

fair opportunity to address the federal question that is sought to be presented here," *Webb v. Webb*, 451 U.S. 493, 501 (1981). To defeat the assumption, the aggrieved party in this Court must affirmatively show the contrary. *Board of Directors of Rotary Int'l*, 481 U.S. at 550. The petitioners could have done this by including a portion of their state court brief in their appendix detailing their federal question issues. In the Statement of the Case, the petitioners' only reference to their federal question argument was, "In this case the Court of Appeals did not deal with the constitutional issue, although it was presented in the brief." Because there is no proof as to what specific federal issues were raised, the petitioners have not met their burden and therefore the petition should be denied.

Even if the petitioners had affirmatively shown that some federal cases were cited, the cases that were cited were not relevant to the instant case. The petitioners cited two federal cases in their appellate brief – but these cases are in no way relevant to the issues in the instant case. A petitioner must make more than casual connections to show that a federal question is involved. These cases were not sufficiently tied to the issues in this case as to allow the state court to rule on the 14th Amendment constitutional claims.

Additionally, there is no federal question involved in this case because the petitioners were not deprived of their 5th or 14th Amendment due process protections. They were not deprived of the right to be heard, or the right to present a defense. The error made by the petitioners was that they chose not to present their evidence of possible medical causes of their daughter's injuries at the appropriate hearing. The State presented its expert witnesses at

the adjudication hearing. The petitioners could, and should, have presented their rebuttal at that time, but chose not to do so. To further compound their error, they did not file an appeal.

The petitioners would have this Court rule that it is of no consequence that they chose not to present their medical evidence at the adjudication hearing. To the contrary, it is precisely because they chose not to take advantage of the opportunity to present this evidence at the adjudication that the trial court later found the evidence was not relevant at the subsequent hearings. The Arkansas Court of Appeals agreed, and also found that the evidence, because it was not presented at the adjudication, was not relevant to the issue being litigated at the later hearings.

The petitioners' argument that findings using a lower standard of proof were used against them in a subsequent hearing requiring a higher burden of proof is not supported by the totality of the record. As already discussed, at the adjudication hearing, the State presented its evidence to prove that the petitioners caused their daughter's injuries. The trial court found that the State had proven its case by a preponderance of the evidence. Then, the trial court held a "no-reunification services" hearing, the purpose of which was to determine whether reunification services should be discontinued. At the beginning of the May 13, 2004, "No reunification" hearing, the State's attorney requested that the record of the entire case be incorporated into the hearing. The motion was granted without objection. The record was again incorporated at the termination of parental rights hearing. This was a critical motion because, while the adjudication findings

were found by a preponderance of the evidence, the "no reunification services" and termination of parental rights hearings use a burden of proof of clear and convincing evidence. The trial court specifically made findings of fact, based on the record as incorporated, that the petitioners had caused their child's injuries. The petitioners fail to acknowledge that the evidence from the adjudication hearing was considered a second time using a higher standard. In their state court briefs, the petitioners argued "The courts have been crystallinely clear in holding that a finding on a lower standard cannot [be] transplanted in to a subsequent hearing using the higher standard." Because the evidence and testimony from the adjudication hearing was incorporated without objection, and the subsequent "no reunification services" hearing findings were made using the clear and convincing burden of proof, there is no justiciable issue of whether different burdens were applied in this case.

CONCLUSION

The petition for a writ of certiorari should be denied. The petitioners have not shown that there is a federal question than needs to be settled. The issue of abuse is decided at the adjudication hearing. The petitioners did not present their expert at this hearing, and they did not appeal this decision. The record from the adjudication hearing was incorporated at the "no reunification hearing" and again at the termination hearing. The two hearings that are on appeal have the same burden of

proof. Therefore, there was no violation of their 5th or 14th Amendment right to due process.

Respectfully submitted,

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